

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CHRISTOPHER A. REESE,                     )  
  )  
  )                     Petitioner,                     )  
  )  
  )                     v.                                     1:13CV775  
  )  
DOUGLAS HENDERSON, et al.,             )  
  )  
  )                     Respondent.                     )

ORDER AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, submitted a petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody. For the following reasons, the Petition cannot be further processed.

1. Filing fee was not received, nor was an affidavit to proceed *in forma pauperis* submitted and signed by Petitioner.
2. Petitioner fails to indicate that state court remedies have been exhausted as required by 28 U.S.C. § 2254(b). This Court cannot grant relief unless state court remedies have been exhausted. Id. In North Carolina, a petitioner may satisfy the exhaustion requirement of § 2254 by raising his claim(s) in a direct appeal of his conviction and/or sentence to the North Carolina Court of Appeals followed by a petition to the Supreme Court of North Carolina for discretionary review, or by raising his claims in a Motion for Appropriate Relief (“MAR”) and petitioning the North Carolina Court of Appeals for a writ of certiorari if the MAR is denied. See Lassiter v. Lewis, No. 5:11HC2082D, 2012 WL 1965434, at \*4-5 (E.D.N.C. May 31, 2012) (unpublished) (citing O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999), and N.C. Gen. Stat. §§ 7A-31, 15A-1422).
3. Petitioner indicates that his convictions were vacated on appeal, but that he is in custody awaiting a new trial. He seeks release because he states that he has

been waiting for five years for the new trial. If so, a filing under § 2254 is not appropriate because Petitioner is a pretrial detainee with no current conviction to challenge under § 2254. Any challenge to his custody would need to be brought under 28 U.S.C. § 2241, although the Court does not intervene in pending state criminal cases absent extraordinary circumstance. Further, not long after filing his Petition, Petitioner submitted a change of address notification (Docket Entry 2) stating that he moved to Central Prison “[d]ue to the wrongful conviction again in Superior Court.” This appears to indicate that he has now been retried and convicted. If so, a § 2254 petition might be proper, but only after Petitioner exhausts any available state court remedies as set out above.

Because of these pleading failures, the Petition should be filed and then dismissed, without prejudice to Petitioner filing a new petition on the proper habeas corpus forms with the \$5.00 filing fee, or a completed application to proceed *in forma pauperis*, and otherwise correcting the defects noted. The Court has no authority to toll the statute of limitation, therefore it continues to run, and Petitioner must act quickly if he wishes to pursue this petition. See Spencer v. Sutton, 239 F.3d 626 (4th Cir. 2001). To further aid Petitioner, the Clerk is instructed to send Petitioner a new application to proceed *in forma pauperis*, new § 2254 forms, and instructions for filing a § 2254 petition, which Petitioner should follow.<sup>1</sup>

*In forma pauperis* status will be granted for the sole purpose of entering this Order and Recommendation.

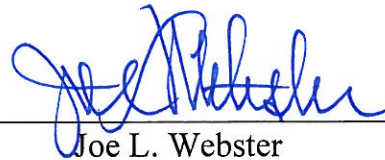
IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Order and Recommendation. The Clerk is instructed to send Petitioner § 2254 forms, instructions, and a current application to proceed *in forma pauperis*.

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<sup>1</sup> If, as now appears less likely, Petitioner is still a pretrial detainee who seeks to file under § 2241, he should seek the proper form for doing so from the Clerk’s Office and use it to file instead.

IT IS RECOMMENDED that this action be filed, but then dismissed *sua sponte* without prejudice to Petitioner filing a new petition which corrects the defects of the current Petition.

This, the 1<sup>st</sup> day of October, 2013.



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Joe L. Webster  
United States Magistrate Judge